

Immigration Law for the Criminal Defense Attorney

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I. Basic terms.

- A. *Major federal entities*: Department of Homeland Security (DHS); U.S. Citizenship and Immigration Services (CIS); U.S. Customs and Immigration Enforcement (ICE); Customs and Border Protection (CBP); Executive Office for Immigration Review, U.S. Department of Justice (EOIR).
- B. *Immigrant vs. nonimmigrant*. An “immigrant” is someone entering the United States to reside permanently. A “nonimmigrant” is someone entering the United States to reside temporarily.
- C. *LPR vs. USC*. Someone granted Lawful Permanent Resident (LPR) status is allowed to live and work in the United States permanently (with certain exceptions and limitations). An LPR cannot vote, register to vote, or claim to be a citizen of the United States, but an LPR may serve in the U.S. military and must pay U.S. income taxes.
 - U.S. citizens may vote in local, state, and national elections.

II. Admissible vs. deportable.

- A. *Admissibility*. A person already lawfully in the United States who applies for permanent resident status can be denied if she has engaged in conduct that makes her inadmissible. Likewise, persons outside the United States who want to immigrate to the United States can be

denied a visa if they have engaged in conduct making them inadmissible. INA § 212.

- B. *Deportability.* A person in the United States lawfully (usually as a lawful permanent resident) can be removed from the United States if he engages in conduct that makes him deportable. INA § 237.
- C. *Punishment for unlawful presence.* A person who is unlawfully present in the United States for one year or more and then departs the United States is inadmissible for 10 years. INA § 212(a)(9)(B)(i)(II). A person who enters the U.S. without inspection is unlawfully present. INA § 212(a)(6)(B)(ii).

III. The Detention and Removal Process.

- A. The charging documents: Notice to Appear, Notice of Rights, Arrest Warrant, etc.
- B. Immigration Hold/Immigration Detainer. “Upon a determination by the Department [of Homeland Security] to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department.” 8 C.F.R. § 287.7(d).
 - (1) Consequences of posting bond prior to trial.
 - (2) Federal agents will generally take an alien into federal custody within two days of release on bond or at expiration of term of incarceration on state charges.
- C. Immigration Bonds.
 - (1) Range from \$2,500 upward.
 - (2) Immigration bonds must be paid in full.

- (3) Most bond hearings are held in Georgia since detainees are moved quickly.

D. Forms of compelled departure from the United States:

- (1) Voluntary return: The foreign national waives the right to a hearing in front of an immigration judge and agrees to be returned to the country of origin.
- (2) Voluntary departure. The Immigration Judge grants the person the right to depart the United States at his or her own expense within a designated number of days.
- (3) Removal. An decision of an Immigration Judge ordering the removal of a non-citizen from the United States. It usually must be executed within 30 days, unless an administrative appeal is pending. After 30 days, a person with a removal order is subject to detention.
- (4) Expedited removal. No right to a hearing in front of an Immigration Judge. The order is issued and executed by agents of the Department of Homeland Security.

IV. Responsibility of Criminal Defense Counsel.

A. *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

- “When the [immigration] law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.”
- “It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the

‘mercies of incompetent counsel.’ To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation.”

B. Retroactivity.

- (1) *Padilla* does not apply retroactively in federal court. *Chaidez v. U.S.*, 568 U.S. ____ (2013).
- (2) *Padilla* does not apply retroactively in South Carolina state courts. *Lucero v. State*, Op. No. 5352 (S.C. Ct. App. Sept. 9, 2015).

V. Crimes making a person inadmissible, INA § 212(a)(2).

- A. Crime involving moral turpitude (CIMT). A person who is ***convicted of or admits*** having committed a crime involving moral turpitude. INA § 212(a)(2)(A)(i)(I). This offense has a “petty offense” exception for a crime committed only one time if the maximum possible penalty does not exceed one year and the actual sentence imposed was not more than six months. INA § 212(a)(2)(A)(ii). This ground of inadmissibility can be waived if certain facts are established by the applicant. INA § 212(h).
- B. Violation of any law relating to controlled substances. INA § 212(a)(2)(A)(i)(II). A waiver is available “insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana” if certain facts are established by the applicant. INA § 212(h).
- C. Multiple convictions with five years of confinement imposed. A person convicted of two or more offenses “regardless of whether the conviction was in a single trial or whether the offense arise from a single scheme of misconduct and regardless of whether the offenses

involved moral turpitude, for which the aggregate sentences to confinement were five years or more.” INA § 212(a)(2)(B).

- D. Controlled substance traffickers. Includes people aiding, colluding, assisting AND family members who obtained any financial benefit and “knew or reasonably should have known” that the financial benefit was the result of the trafficking. INA § 212(a)(2)(C).
- E. Prostitution. Persons who come to the U.S. to engage in prostitution or who has engaged in prostitution within the past 10 years. INA § 212(a)(2)(E).
- F. Other offenses. Includes persons granted immunity from prior prosecutions, traffickers in persons, persons engaged in money laundering.

VI. Crimes making a person deportable. INA § 237(a)(2).

- A. General crimes. INA § 237(a)(2)(A).
 - 1. CIMT. Conviction of a crime involving moral turpitude committed within five years (or 10 years for certain aliens) AND the crime is one for which a sentence of one year or longer may be imposed.
 - 2. Multiple criminal convictions. Conviction for two or more CIMTs regardless of whether the person was confined for the offenses.
 - 3. Aggravated felony.
 - 4. High speed flight from an immigration checkpoint.
- B. Controlled substances. INA § 237(a)(2)(B).

1. Conviction of any controlled substance offense other than “a single offense involving possession for one’s own use of 30 grams or less of marijuana.”
 2. Drug abusers and addicts (an “alien who is, or at any time after admission has been, a drug abuser or addict is deportable”).
- C. Firearms offenses. INA § 237(a)(2)(C).
- D. Domestic violence and crimes against children. INA § 237(a)(2)(E).

VII. Sample Crimes Involving Moral Turpitude (CIMTs).

A. Definition:

- “As a general rule, a crime involves ‘moral turpitude’ if it is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.” *Matter of Sanudo*, 23 I & N Dec. 968, 970 (BIA 2006) (holding domestic battery is not a CIMT).
- “Moral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong, or malum in se, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude.” *Matter of Fualaau*, 21 I & N Dec. 477 (BIA 1996).

VIII. Aggravated felonies. INA § 101(a)(43).

- A. A crime of violence “for which the term of imprisonment is at least 1 year.” INA § 101(a)(43)(F).
- “Term of imprisonment” for immigration purposes **includes suspended sentences**. INA § 101(a)(48)(B). Thus, a person sentenced to one year suspended upon completion of probation

is affected, whereas a person who is sentenced to 364 days suspended upon completion of probation is NOT affected.

- B. A theft offense or burglary offense “for which the term of imprisonment is at least 1 year.” INA § 101(a)(43)(G).
- C. Murder, rape, or sexual abuse of a minor, trafficking in a controlled substance, trafficking in firearms, child pornography, espionage, alien smuggling, counterfeiting passports, perjury, and many others.

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